85-2040

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OLEN WARD MURFF, Administrator of the Estate of DAN ALLEN MURFF, Deceased, and MRS. CYNTHIA G. FITZGERALD, Individually and as Administratrix of the Estate of JOHN LEE FITZGERALD, Deceased, and as Mother and Next Friend of DYANNA BROOKE FITZGERALD, a Minor, as Community Survivors of JOHN LEE FITZGERALD, Deceased, NATIONAL AVIATION UNDERWRITERS, INC. and NATIONAL GENERAL INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE M. FLEMING
LAW OFFICES OF
GEORGE M. FLEMING, P.C.
1330 Post Oak Boulevard
Suite 3030
Houston, Texas 77056
(713) 621-7944
Attorney for Petitioner
CYNTHIA FITZGERALD, *et al.*

QUESTIONS PRESENTED

1. May an appellate court substitute its factual findings for those of the district court that heard the case, when the district court's factual findings are supported by the trial evidence?

2. Should a duty be imposed on pilots to see and avoid other aircraft under weather conditions that make such a duty physically impossible for a pilot to perform?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rules 15.1(b) and 28.1, Counsel for Petitioner certifies that the parties to this proceeding are:

* DYANNA BROOKE FITZGERALD
* CYNTHIA FITZGERALD

BILL WAYNE MURFF
CAROLYN MURFF
JOHN WARD MURFF
OLEN WARD MURFF

* NATIONAL AVIATION UNDERWRITERS, INC.
* NATIONAL GENERAL INSURANCE COMPANY

UNITED STATES OF AMERICA, Defendant.

---

* Denotes plaintiffs on whose behalf this petition is filed.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
APPENDIX A	A-1
APPENDIX B	A-12
APPENDIX C	A-18

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. *City of Besemer City*, 105 S. Ct. 1504 (1985) 5

Dickens v. *United States*, 378 F. Supp. 845, 854 (S.D. Tex. 1974) *aff'd* 545 F.2d 886 (5th Cir. 1977) 5

Felder v. *United States*, 13 Av. L. Rep. (CCH) 17,820, 17,821 (D. Ariz. 1974) 7

Furumizo v. *United States*, 381 F.2d 965 (9th Cir. 1967) 5

Hartz v. *United States*, 387 F.2d 870 (5th Cir. 1968) .. 5, 6

Stork v. *United States*, 430 F.2d 1104 (9th Cir. 1970) . 5

United States v. *Union Trust Co.*, 350 U.S. 907 (1955) 5

United States v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948) 5

Yates v. *United States*, 497 F.2d 878 (10th Cir. 1974) . 5

Statutes & Regulations

Federal Rule of Civil Procedure 52(a) 2, 4

14 C.F.R. § 91.67(a) 2, 7

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

OLEN WARD MURFF, Administrator of the Estate of DAN ALLEN MURFF, Deceased, and MRS. CYNTHIA G. FITZGERALD, Individually and as Administratrix of the Estate of JOHN LEE FITZGERALD, Deceased, and as Mother and Next Friend of DYANNA BROOKE FITZGERALD, a Minor, as Community Survivors of JOHN LEE FITZGERALD, Deceased, NATIONAL AVIATION UNDERWRITERS, INC. and NATIONAL GENERAL INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The original opinion of the Appeals Court which was withdrawn by that Court is not reported but is set out hereto as Appendix C*. The later opinion of the Appeals Court (Appendix B) is reported at 785 F.2d 552 (5th Cir. 1986). The opinion of the District Court is not reported but is set out as Appendix A.

* Any reference to the Appendix refers to the Appendix set forth hereto.

JURISDICTION

The Fifth Circuit originally entered judgment in this matter on March 17, 1986. Appendix B. The Fifth Circuit then withdrew that decision substituting another opinion and judgment on March 31, 1986. Appendix C. A Petition for Rehearing and Suggestion of Hearing En Banc was denied on April 17, 1986. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Civil Procedure 52(a) which states in pertinent part:

> . . . findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

This case also involves 14 C.F.R. § 91.67(a) which states in pertinent part:

> . . . when weather conditions permit, regardless of whether an operation is conducted under instrument flight rules or visual flight rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section . . .

STATEMENT OF THE CASE

This case arises from the deaths of Dan Murff and John Fitzgerald, pilots of a Cessna aircraft that collided in mid-air with an F-27 aircraft near Dallas, Texas on August 6, 1980. The F-27 is a large, high-speed, twin engine aircraft that was on an instrument flight plan from South Dakota to Dallas Love Field. The Cessna aircraft occupied by Murff and Fitzgerald departed Fort Worth's Meacham Field and was on a local training flight. Like almost all aircraft operating today, neither the Cessna nor the F-27 had radar capability to locate other aircraft in flight. For this information, pilots rely on FAA air traffic control

(ATC) personnel who do have radar equipment that show aircraft position relative to one another as well as additional information.

FAA air traffic control radar scopes showed the location, registration number, altitude and airspeed of the F-27 and the location of the Cessna. The FAA air traffic controllers manning the radar scopes were in communication with the F-27 prior to the mid-air collision as the F-27 was descending through a broken or scattered cloud layer which separated the two aircraft.

The FAA air traffic controller knew there might be a collision between the two aircraft and gave an initial advisory to the F-27:

> "Fairfield Seven Whiskey Alpha, VFR traffic at one o'clock ah four miles, southeast bound, slow moving, altitude unknown."

The purpose of this ATC advisory was to see if the F-27 could spot or see the Cessna. In response, the F-27 told ATC:

> "Ah Whiskey Alpha looking, ah no joy, we're above a cloud deck here."

The term "no joy" indicates the F-27 could not see the Cessna since the F-27 was above and the Cessna was just below a cloud deck. The F-27 was descending at high speed from above the cloud deck on a collision course with the Cessna below the cloud deck. Neither aircraft could see the danger that the air traffic controllers could see on their radar scopes.

Before the mid-air collision, the FAA air traffic controllers failed to communicate any additional (1) safety advisory or information nor any (2) vector or instructions to follow a different course which would have changed the direction of the F-27 and prevented the collision. Instead, the controllers then did nothing as the F-27 and Cessna targets merged on ATC radar scopes. These ATC failures were in violation of several sections of FAA en route air traffic control manuals and the standard custom and practices expected which were explained at trial not

only by plaintiffs' expert but also defendant's ATC personnel and the defendant's principal ATC expert.

The District Court found that due to the clouds restricting the visibility of the pilots to see one another, the FAA radar screen offered the only means of perceiving the impending collision and of preventing it. The District Court found the pilots could not see the other's plane and that only the controllers had available the knowledge, means and power to prevent the crash. Appendix A. Under the Federal Tort Claims Act, the District Court found the air traffic controllers seventy percent (70%) at fault and the Cessna pilots thirty percent (30%) and awarded damages.

The defendant appealed to the Fifth Circuit. The Fifth Circuit's first opinion was withdrawn sua sponte since the Appeals Court "simply misread a trial court finding." In its second opinion, the Fifth Circuit substituted its factual findings for the District Court's after concluding the facts the District Court found were clearly erroneous. In its second opinion, the Fifth Circuit found the pilots' duty to avoid the collision was primary and the controllers' secondary under the conditions of this case. Such conditions include:

(1) A cloud deck between the two aircraft which prevented the pilots from spotting each other in time to avoid the collision;

(2) ATC's, not pilots, have radar scopes which show aircraft location to one another;

(3) Pilots rely on ATC's who have radar scope information to give advisories and instructions so that mid-air collisions can be avoided.

REASONS FOR GRANTING THE WRIT

I.

Rule 52(a) provides that "findings of facts shall not be set aside unless clearly erroneous." The appellate court is not entitled to reverse a finding of the trier of fact simply because it

is convinced it would have decided the case differently. *Anderson* v. *City of Besemer City*, 105 S.Ct. 1504 (1985). Rather, the entire evidence in the case must leave the definite and firm conviction that a mistake was committed. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948).

In the present case, the trial court considered extensive factual, expert, documentary and demonstrative evidence. Substantial evidence at trial showed that the air traffic controllers, rather than the pilots, were the only ones who had the knowledge, means and power to prevent the crash. ATC had radar which allowed them to know and predict a collision. Yet ATC did not properly advise or instruct the F-27 so the collision could be avoided. The trial evidence showed that pilots rely on ATC for this advice and instruction since aircraft are not equipped with the type of ATC radar that would enable pilots to predict a collision course. The pilots in the present case could not see one another or anticipate their impending crash since a cloud deck separated them before the collision.

The trial evidence showed that the relationship between the pilot and air traffic control is a cooperative one. Pilots predicate many of their decisions on information from FAA air traffic control personnel. The United States can be held liable under the Federal Tort Claims Act for the negligence of its air traffic control personnel. *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955); *Yates* v. *United States*, 497 F.2d 878 (10th Cir. 1974); *Stork* v. *United States*, 430 F.2d 1104 (9th Cir. 1970); *Hartz* v. *United States*, 387 F.2d 870 (5th Cir. 1968); *Furumizo* v. *United States*, 381 F.2d 965 (9th Cir. 1967).

Several courts have noted the dependence of pilots upon information obtained from air traffic control personnel. For example, in *Dickens* v. *United States*, 378 F. Supp. 845, 854 (S.D. Tex. 1974), *aff'd*, 545 F.2d 886 (5th Cir. 1977) the trial court stated:

> Without the air traffic controller, however, in some instances the pilot is helpless. Thus, he cannot be held

> legally responsible for his aircraft until he is apprised of all information material to its operational safety.

Therefore, under certain conditions, before a pilot can be held legally responsible, he must be supplied with pertinent facts from air traffic control. *Hartz, supra.*

Radar scopes are not provided to FAA air traffic controllers so they may be eyewitnesses to mid-air collisions. They have a duty to advise and instruct pilots so that mid-air collisions can be avoided. The radar puts ATC in a position to know of an impending collision. The lack of radar, plus the clouds blocking the vision of one aircraft to the other, left the pilots here without knowledge that a collision was about to occur. The trial evidence, including FAA air traffic control manuals, the air traffic controllers' own testimony, and defense and plaintiff air traffic control experts support the dependence of the pilots on air traffic control services in this case and the findings of the District Court that ATC was seventy percent (70%) at fault in this collision.

Without hearing the evidence, and by selectively relying on some of the District Court's factual findings and excluding others, the Appeals Court replaces its factual determinations for those of the trier of fact. Having not listened to the trial evidence, the Appeals Court misinterprets the relationship between air traffic controllers and pilots and fails to recognize the reliance of pilots on ATC radar advisories and instructions in preventing mid-air collisions in the nation's airspace. The Appeals Court here has usurped the fact finder's role and prerogative in such a way as to leave little function for the trial court.

II.

Shortly before the mid-air collision, the F-27 pilot reports to ATC that he could not see the Cessna because "we're above a cloud deck here." The F-27 was descending from above a cloud deck. The Cessna was below the cloud deck. The clouds blocked visibility between the F-27 and the Cessna until it was too late to

avoid the crash. The evidence at trial led the District Court to conclude:

> Was it possible for them [the pilots] to see the other's plane in time to avoid? The Court finds it was not. The evidence indicates that the F-27 was descending toward a cloud deck and would not have been visible to the 172 [the Cessna] until after it emerged from the clouds. Appendix A.

Pilots are expected to maintain vigilance to see and avoid other aircraft when weather conditions permit. 14 C.F.R. § 91.67(a). Based on the trial evidence the District Court concluded weather conditions did not permit the pilots here to maintain vigilance to be able to see and avoid. There was ample support for the District Court's factual findings at trial including:

(1) The report on the air traffic control tape and transcript from the descending F-27 shortly before the mid-air collision that he is looking for the Cessna but can't spot him because "we're above a cloud deck here;"

(2) Extensive documentation of weather data from government aircraft accident investigative agencies;

(3) The testimony of the defendant's and plaintiffs' ATC and pilot experts.

This nation provides an air traffic control system to pilots. That system includes extensive communication, navigation and radar equipment throughout the country. The ATC system includes flight service, en route and terminal air traffic controllers throughout the country. This nation provides such an extensive air traffic control system because pilots are unable to fly safely without critical information obtainable only through ATC.

In *Felder* v. *United States,* 13 Av. L. Rep. (CCH) 17,820, 17,821 (D. Ariz. 1974), the court states:

> The principle object of air traffic control is to insure safety, orderly and rapid movement of aircraft within the control

> zone. This involves the proper sequencing and spacing of aircraft, providing of weather, navigational and flight information, advice and instruction by air traffic radar controller. Of primary concern is the safe and orderly operation of aircraft within the control zone. . . .
>
> It is the duty and responsibility of air traffic radar controller to apprise pilots of any unsafe or dangerous condition which might interfere with the pilot's knowledge of his aircraft, when such condition is known to the specialist or would have been observed by a reasonably prudent specialist in such circumstances. . . .

By holding that the pilots here had the primary duty to avoid the collision, the Appeals Court reverses the normal responsibilities of air traffic controllers and pilots in the nation's airspace. Due to their radar capability, only ATC had the information that a mid-air collision was imminent in this case. The pilots, due to the clouds separating them, were physically unable to avoid the collision without proper ATC service. Ascribing primary responsibility to pilots to avoid such a mid-air collision under such weather conditions would require a pilot to see through a cloud deck. As human beings, that is something that most pilots would have great difficulty accomplishing.

Holding pilots to such a responsibility is not consistent with the evidence developed at trial nor the manner in which the nation's airspace is operated. But there is another reason why such a duty is unrealistic and should not be imposed. Holding a pilot descending from above a cloud deck to a duty to avoid a collision with an aircraft below the cloud deck without proper ATC service is physically impossible for a pilot to perform.

CONCLUSION

For the reasons set forth, it is respectively submitted that this Petition for Certiorari be granted.

Respectfully submitted,

GEORGE M. FLEMING
LAW OFFICES OF
GEORGE M. FLEMING, P.C.
1330 Post Oak Boulevard
Suite 3030
Houston, Texas 77056
(713) 621-7944

Attorney for Petitioner
CYNTHIA FITZGERALD, *et al.*

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

OLEN WARD MURFF, ET AL,
Plaintiffs
VS.
UNITED STATES OF AMERICA,
Defendant
NATIONAL AVIATION UNDERWRITERS, INC. AND NATIONAL GENERAL INSURANCE COMPANY,
Intervenors

} Civil Action No. B-83-54-CA

MEMORANDUM OPINION

This Federal Tort Claims Action arises from a tragic mid-air collision on August 6, 1980. A Cessna 172 occupied by the plaintiff's decedents collided with a Fairchild F-27 at 6600 feet near Bridgeport on the northwest fringe of the Dallas-Fort Worth air traffic control area. Although damaged by the collision, the F-27 airliner landed safely nearby without injury to its occupants. Absent its left wing the Cessna plunged to earth. Flight instructor John L. Fitzgerald, and his student, Dan A. Murff, did not survive the crash.

The survivors of the two men sued the United States of America under the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, alleging that the negligence of air traffic controllers caused the crash and deaths. The case was tried to the Court.

Messrs. Murff and Fitzgerald were on an instrument training flight in weather offering 15 miles visibility with scattered cloud cover. Murff, 19, already licensed as a pilot of some fixed wing and rotorwing aircraft, was near completion of training for an instrument rating under the tutelage of Fitzgerald. Fitzgerald, 37, an experienced pilot and instructor, had flown light airliners and was soon to begin work as a pilot for the Government. Messrs. Murff and Fitzgerald began their last flight from Meacham Field in Fort Worth around 11:00 a.m. (1700 hr. G.M.T.) under visual flight rules (VFR) with notice from an air traffic control center that the radar signal from the Cessna's transponder was "weak," but apparently discernible. A combination of oversights and omissions by both men, as well as the defendant, brought an untimely end to the flight and the men's lives.

Murff and Fitzgerald neglected to file a flight plan and did not request flight following or radar service from air traffic control once airborne. Apparently, they did not take the precaution of burning the Cessna's landing light as encouraged by the FAA's "lights on program." Supposedly, because of the temperature,

Fitzgerald decided to fly above the 5000 foot ceiling recommended by his employer, Acme School of Aviation. Fitzgerald also apparently directed Murff to maneuver near the Bridgeport VOR Station, a frequent intersection point for instrument flight rules (IFR) traffic. Finally, while it is uncertain whether the pilots failed to monitor the radio channel used by IFR traffic in the vicinity, they at least failed to notify the controllers of their location and intentions.

The F-27, a twin engined turbo-prop plane, left Rapid City, South Dakota with 17 people aboard for a direct flight to Dallas' Love Field. Approaching the Bridgeport VOR, the F-27 reported at 1720:55 its location and altitude of 19,000 feet. The pilot apparently turned east and was told at 1725:12 to descend to 10,000 feet. Six minutes later, at 1731:49, air traffic control instructed the F-27 to go 10 miles east of Bridgeport at and maintain 6,000 feet. Throughout its flight and until the collision, the F-27 crew was flying a course and altitude approved, if not entirely prescribed, by FFA controllers.

At 1735:48, still descending and flying at c. 200kts., the F-27 crew received its' only warning of nearby traffic:

> Fairchild seven whiskey alpha: VFR traffic at one o'clock. Ah, four miles, southeast bound, slow moving, altitude unknown.

Responding to the traffic advisory, an F-27 crewman answered:

> Ah, whiskey alpha; lookin(g) ah, no joy (sic). We're above a cloud deck here.

"No joy," although not "approved phraseology," is airman slang for no contact or no sighting. The controllers understood the F-27's message. He was looking for the plane at one o'clock, but did not see it. Perhaps it was below the clouds to which the Fairchild was descending. The planes, although approaching one another, did not then appear to be on collision courses.

At about this time, the Court finds, the 172 was maneuvering somewhere in the vicinity of the Bridgeport VOR under visual flight rules (VFR). The altitude of the Cessna, like its precise location in the minutes before the collision, is unknown. Presumable, student Murff was wearing a "hood" which restricted his vision to the instruments. However, Murff's instructor, Fitzgerald, should have been on the lookout for other planes while Murff was under the hood, flying by the instruments.

The radar target detected by the controller and reported to the F-27 was not enhanced by a transponder signal, indicating the plane was flying VFR and had no working transponder turned on. Had it been an IFR target, the controller would have known at least the plane's reported altitude and speed and could have inquired as to its course. The same would have been true had its crew merely contacted the controller and so advised him. Such was not the case.

It appears that the Cessna pilot changed course shortly after the traffic advisory. Perhaps he was already turning when the controller called the F-27. In any event, the Cessna ultimately was on a converging course 143 degrees from the F-27's heading. The planes' closing speed was approximately 500 feet per second, or about 285 kts.

During the time between the traffic advisory at 1735:48 and the report of the collision at 1737:14, the traffic in the controllers' sector was light. Controller Williams observed no other VFR traffic near the F-27 in the minutes preceding the collision. The transcript of the controller's radio transmissions shows he was working only three IFR planes in his sector. No radar malfunction was reported that day. Although Williams and his co-worker, Harrell, had other duties besides monitoring the radar screen, such as reviewing flight "strips" as to incoming IFR traffic and time monitoring, these tasks were neither pressing nor of higher priority. While they had the ability to monitor the radar screen in the time preceding the crash — during which

the radar displayed six "updates" — the controllers did not apprehend the convergence of the two aircraft.

At 1737:14, the F-27 told the controller about the collision:

> Ah, center: Fairchild 707 whiskey alpha.
>
> We've just had a mid-air.

The Cessna and the F-27 collided, damaging the latter's stabilizer and the left wing and wing strut of the former. Fortunately, the airliner's crew made a safe emergency landing nearby. The Cessna crashed and Messrs. Murff and Fitzgerald were killed.

Apparently, the Fairchild crew never saw the Cessna, and obviously the decedents did not see the F-27 in time to avoid it. Both planes were painted white and likely both had clouds behind. Moreover, even a diligent scanning by the pilots might not have detected the others' plane in time to avoid it. The court heard testimony, for example, that the customary scanning of the horizon by a pilot — observing the sky from one side of the windshield to the other — can take as long as 15 seconds. At their estimated closure speed of 500 feet per second, the planes could move 1.25 miles closer between observations through a particular 10 degree arc of the windshield. Given the pilots' failure, perhaps inability, to see and avoid the other's plane, the radar screen of the FAA offered the only remaining means of perceiving the impending collision and of preventing it.

The United States may be liable under the Federal Tort Claims Act for negligently providing services upon which the public relies. The duty of the government to advise and assist pilots rests both upon the regulations of the FAA and the general reliance of pilots on the government for a given service. *Gill* v. *United States*, 429 F.2d 1072 (5th Cir. 1970); citing *Hartz* v. *United States*, 387 F.2d 870 (5th Cir. 1968). Here, the pilots relied on the government — as all pilots must — to provide safety advisories and directions to avoid collisions.

The Plaintiffs insist, and the Court agrees, that in the circumstances of this case, the FAA controllers had a duty to warn about a possible collision and to act to prevent it. That duty is inherent to the mission of air traffic control: "to provide for the safe, orderly, and expeditious flow of air traffic." See 14 C.F.R. 65.45(a). FAA manuals further emphasize that controllers should be "intimately and continuously concerned with safety and the protection of life and property." Moreover, controllers are specifically advised to "continually issue instructions to pilots on what headings to follow to maintain separation, what altitudes to fly to remain clear of traffic . . ."

The general duty of the FAA is modified, however, by specific directives which set priorities as to different types of air traffic. The primary concern of the FAA is the direction of the IFR traffic, consisting mostly of commercial airline flights. Workload permitting, controllers advise and otherwise assist VFR traffic. One might say the FAA has a "higher" duty to IFR than to VFR pilots, but that is not correct. Rather, the FAA has an "earlier" duty thereto. But once a controller has directed his IFR pilots, his duty to VFR pilots arises — and rises to the same level of care for the "safety and protection of life and property" of VFR as of IFR pilots. In particular, those duties include issuing traffic advisories to converging aircraft and vectoring aircraft to maintain safe separation between them.

In the context of this case, the two FAA controllers directing the crash sector clearly had a duty to protect the F-27's occupants. And if their workload permitted, the controllers were duty bound to protect the plaintiffs' decedents. The evidence is uncontroverted that the controllers' workload was light at that time. Only three IFR planes were in their sector and radio transmissions were few. Moreover, radar showed no other traffic near the converging aircraft. The court finds that the flight activity in the sector in the critical minutes preceding the crash was sparse. Inasmuch as not one, but two controllers were working the crash

sector then, there can be no doubt that they had the time and ability to protect the crew of the Cessna.

The radar did not malfunction that afternoon, and the two controllers, both seated closely to the screen, could see the two targets coming together. The planes' increasing proximity caused controller Williams to warn the Fairchild when the aircraft were about four miles apart, but he and his co-worker, Harrell, apparently failed to look again at the screen in the next minute and a half. In that interval, the radar displayed six new views of the aircrafts' relative positions. In addition, the controllers had the ability to display the past four "hits" on the screen and therefore see the Cessna's course change. Neither man observed the continuing convergence of the aircraft. Neither tried to contact the VFR target by radio so as to ascertain its altitude and heading. And, as a result, neither controller warned of the impending disaster. Only after the report of the "mid-air" did Williams offer a vector to the Fairchild. Had he done so earlier, the crash would not have occurred.

Asked what the controllers were doing in the crucial interval, Williams replied, "Other control functions associated with the Bridgeport radar positions." No radio calls distracted the controllers during the interval and neither could remember any other events which prevented them from watching and warning the pilots. "Other control functions,'" the court finds, were merely lower priority tasks.

The court finds that no higher priority tasks required the controllers' attention then, and they therefore owed a duty to Murff and Fitzgerald as well as the occupants of the Fairchild. That duty was to exercise reasonable care in advising and directing the pilots to prevent the loss of life and property. Under these circumstances and considering the light radar and radio traffic at the time, the two controllers failed to act in a reasonable manner. Their failure to watch, to warn, and to maintain "separation" of the aircraft was negligence, for which the Defendant is

liable. Indeed, had they simply told the Fairchild to briefly alter course, the tradegy would have been averted.

To say the controllers caused the collision seems, at first glance, to go too far. True, they ordered the F-27 to fly that heading. But the Cessna moved beyond their control, apparently incommunicado, and it turned unwittingly into the path of the F-27. But because the pilots could not see the others' plane, the controllers were the only people who, during the final eighty seconds, had available the knowledge, the means, and the power to prevent the crash.

The government insisted that the pilots alone were at fault in failing to "see and avoid" each other. Such a rule, so broadly applied, subsumes all collisions. Obviously the pilots failed to see and avoid; their planes collided. Was it possible for them to see the others' plane in time to avoid? The court finds it was not. The evidence indicates that the F-27 was descending toward a cloud deck and would not have been visible to the 172 until after it emerged from the clouds. Moreover, there were likely clouds below the Cessna, as well. Both planes were white and would be hard to see with clouds behind them. The Cessna may have been as little as 500 feet below the cloud from which the Fairchild emerged. Moreover, the 172 was turning to the left when it struck the F-27. With his left wing down, the pilot of the 172 had an obstructed view. And the planes' closing speed of 500 feet per second gave the pilots precious little time to react. The court finds, therefore, that the negligence of the controllers was a proximate cause of the crash.

The victims themselves, however, were not without fault. As noted above, both were experienced pilots, presumably familiar with safety procedures. Both men failed to exercise reasonable care by advising controllers of their locations and intentions, by not requesting flight following or radar service, and by not burning the landing light. Fitzgerald, as the instructor, had an additional responsibility to Murff who, necessarily, was relying on

Fitzgerald to keep a lookout while Murff wore the hood. Moreover, Fitzgerald was further negligent in choosing to fly at the collision altitude while near the Bridgeport radial. He further erred in continuing the flight after he learned of the 172's weak transponder signal.

For the above reasons, the Court finds JOHN LEE FITZGERALD, deceased, and DAN ALLAN MURFF, deceased, to be contributorily negligent and their comparative fault to be fifteen (15%) percent, respectively, for a total of thirty (30%) percent, and the comparative fault of the controllers to be seventy (70%) percent.

When the unfortunate accident occurred, Mr. Fitzgerald was thirty-seven (37) years old, in good health, with a work life expectance of some twenty-two (22) years. He was an experienced commercial pilot and instructor and he had a large earning potential. He is survived by a widow and young daughter, both of whom suffered severe mental anguish due to their husband and father's death. They also lost the love, affection and companionship of their husband and father, which loss affects them for years to come. Finally, the Court finds that Mr. Fitzgerald endured considerable mental suffering from the time of the collision until he finally met his death. The aggregate damage with respect to Mr. Fitzgerald, considering the reasonable amount of money which he would have spent on his own maintenance, and discounting to present value all future damages as required by *Culver* v. *Slater Boat*, 722 F2d 114 (5th Cir. 1983), and deducting said amount thirty (30%) percent of the comparative fault attributable to the deceased and seventy (70%) percent of the comparative fault attributable to the Defendant, the Court finds the total damages to be Seven Hundred Fifty Thousand ($750,000.00) Dollars.

DAN ALLAN MURFF was nineteen (19) years of age at the time of his death and was a single man. However, he was a valuable producer on the family farm and was a vital family

member from an emotional standpoint. Mr. Murff had a work life expectancy of some thirty-eight (38) years when he died, and he had a promising income potential. Already licensed as a helicopter pilot, he worked as a pilot part-time and also worked regularly on the family rice farm. The Court finds that Mr. Murff would have continued to work in the family enterprise in the future, and would continue to provide economic support to the family as he grew older. Because of his closeness to his family, the Court finds his parents suffered severe mental anguish upon his death and are further deprived of Mr. Murff's future love, affection, and support. Like Mr. Fitzgerald, he suffered severe mental anguish while falling to his death. The aggregate damage with respect to Mr. Murff, considering the reasonable amount of money which he would have spent on his own maintenance, and discounting to present value all future damages as required by *Culver* v. *Slater Boat,* 722 F.2d 114 (5th Cir. 1983), and deducting said amount thirty (30%) percent of the comparative fault attributable to the deceased and seventy (70%) percent of the comparative fault attributable to the Defendant, the Court finds the total damages to be Seven Hundred Thousand ($700,000.00) Dollars.

Accordingly, judgment will be entered in favor of the Fitzgerald plaintiffs and against the Defendant in the amount of Seven Hundred Fifty Thousand ($750,000.00) Dollars, and judgment will be entered in favor of the Murff Plaintiffs and against the Defendant in the amount of Seven Hundred Thousand ($700,000.00) Dollars.

However, the parties have stipulated that the intervenors, NATIONAL AVIATION UNDERWRITERS, INC. and NATIONAL GENERAL INSURANCE COMPANY, have a worker's compensation lien on damages awarded to the Fitzgerald plaintiffs in the amount of Seventeen Thousand Eight Hundred Seventy-four and 89/100 ($17,874.89) Dollars as of

August 15, 1984. Any additional amounts of worker's compensation payments paid will be added to this amount and will be deducted from the total amount of damages awarded to the Fitzgerald plaintiffs and paid directly to the Intervenors, NATIONAL AVIATION UNDERWRITERS, INC. and NATIONAL GENERAL INSURANCE COMPANY.

SIGNED AND ENTERED this 29th day of November, 1984.

s/_____

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OLEN WARD MURFF, Administrator of the Estate of DAN ALLEN MURFF, Deceased, *et al.*,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 85-2002
OPINION

Filed March 17, 1986

Before: THOMAS GIBBS GEE, ALVIN B. RUBIN, and W. EUGENE DAVIS, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the Eastern District of Texas
JOE J. FISHER, Senior District Judge, Presiding

OPINION

PER CURIAM:

At a bench trial in this Federal Torts Claims Act[1] case, the district court apportioned fault in a mid-air collision — one that took place under visual conditions — seventy percent to the air traffic controllers and fifteen percent to each pilot. The United States appeals the consequent judgment against it for damages, contending, among other claims, that this apportionment was clearly erroneous. Concluding that it was, and further concluding that, on the predicate facts found by the trial court, no determination that the controllers were so much as equally at fault

[1] 28 U.S.C. § 2671.

with plaintiff's decedent can be supported, we reverse the judgment appealed from and remand for entry of judgment for the United States.

FACTS

In August 1980 a light airliner on a flight from South Dakota to Dallas collided with a small training plane near Fort Worth. The airliner, a Fairchild F-17 flying under Instrument Flight rules (IFR), landed successfully. The other, a Cessna 172 flying under visual rules, (VFR), fell to earth, carrying instructor and student to their deaths. Both were experienced pilots, the instructor, John Fitzgerald, considerably more so than his pupil, Dan Murff, however.

The Cessna became airborne at about 11:00 a.m. on the morning of the crash and embarked on a catalogue of actions and omissions that substantially increased the likelihood of its occurrence. As the trial court found:

> Murff and Fitzgerald neglected to file a flight plan and did not request flight following or radar service from air traffic control once airborne. Apparently, they did not take the precaution of burning the Cessna's landing light as encouraged by the FAA's "Lights on Program." Supposedly, because of the temperature, Fitzgerald decided to fly above the 5000 foot ceiling recommended by his employer, Acme School of Aviation. Fitzgerald also apparently directed Murff to maneuver near the Bridgeport VOR Station, a frequent intersection point for instrument flight rules (IFR) traffic. Finally, while it is uncertain whether the pilots failed to monitor the radio channel used by IFR traffic in the vicinity, they at least failed to notify the controllers of their location and intentions.

In addition, the court found, because the Cessna was on an instrument training mission, "presumably, student Murff was wearing a 'hood' which restricted his vision to the instruments." And so, shortly after eleven o'clock, we find the Cessna, burning no landing light and with one of its two lookouts blinded,

maneuvering at a dangerous altitude in an intersection of aerial traffic without having notified the controllers of what it was about.

The F-27 airliner, by contrast, was flying IFR and under the direction of the controllers, who knew its precise altitude, speed, and direction at all material times. Entering the area of the Bridgeport VOR, the F-27 reported in at 11:20:55 a.m. at an altitude of 19,000 feet and, at 11:25:12, was cleared for descent to 10,000. Six minutes later, it was cleared to 6,000 feet and a position ten miles east of the VOR. At 11:35:48 the controllers warned it of the Cessna's presence:

> Fairchild seven whiskey alpha VFR traffic at one o'clock ah four miles southeast bound slow moving altitude unknown.

Thus, although the Cessna could have been at any altitude and the chances of its being on the same exact level as the F-27 were small, the aircraft were approaching each other on near reciprocal courses.

At 11:36:00 the F-27 responded to the traffic advisor:

> Ah Whiskey Alpha looking ah no joy[2] we're above a cloud deck here.

Sometime within the next one minute and fourteen seconds, the collision occurred, for at 11:37:14 the F-27 reported it to the controller:

> Ah center Fairchild Seven Zero Seven Whiskey Alpha we've just had a mdi-air [collision].

As was noted at the outset, the transport was able to land safely following the collision, but the trainer was lost.

THE DUTIES INVOLVED

[1] Although the trial judge made no specific finding that the collision occurred in an area of clear air, free of clouds, other

---

[2] "No joy" is airman's slang for no sighting or no contact.

expressions in his opinion make plain — as does the record evidence — that this was the case.[3] In such circumstances, the primary responsibility for avoiding collisions rests with the pilots, not the controller. Numerous authorities so recognize; indeed, the proposition seems generally settled. *In re N-500L cases,* 691 F.2d 15, 28 (1st Cir. 1982), for example, the court observed that, according to regulations having the force of law:

> Although air traffic controllers may have responsibilities concurrent with those of the pilot in the terminal area, . . . the primary responsibility for avoiding collision and wake turbulence in VRF conditions is with the pilot (citation omitted).

Accord, United States v. *Schultetus,* 277 F.2d 322, 327 (5th Cir.) *cert. denied,* 364 U.S. 828 (1960). It is thus apparent that the primary responsibility for avoiding the fatal collision lay on the Cessna and F-27 pilots, not upon the controllers.

DEGREES OF FAULT

[2] The trial court found the controllers largely at fault (70%) and the pilots mildly and equally so (15% each) in causing the collision. It is, of course, immediately apparent that the finding of equal fault is clearly erroneous. The F-27 pilots obeyed all rules and followed all instructions; their negligence, if any there was, consisted in failing to see a white airplane against a white cloud — an airplane that was closing on them, the court found, at 500 feet per second — in time to avoid the collision.

---

[3] Statements of the F-27 crew were that they never entered the clouds, but rather were proceeding from clear air at altitude down through a space between the clouds; and the plaintiff's expert witness had "no doubt" that the collision took place in visual conditions.

The court's opinion appears to assume that this was the case observing, for example, "both planes were painted white and likely both had clouds behind."

[3] Assuming that this failure was negligence, the pilots of the Cessna were equally guilty of it. As the trial court found, however, their fault did not stop there:

> The victims themselves, however, were not without fault. As noted above, both were experienced pilots, presumably familiar with safety procedures. Both men failed to exercise reasonable care by advising controllers of their location and intentions, by not requesting flight following or radar service, and by not burning the landing light. Fitzgerald, as the instructor, had an additional responsibility to Murff who, necessarily, was relying on Fitzgerald to keep a lookout while Murff wore the hood. Moreover, Fitzgerald was further negligent in choosing to fly at the collision altitude while near the Bridgeport radial. He further erred in continuing the flight after he learned of the 172's weak transponder signal.[4]

In view of the above, it is patent that the Cessna pilots were more at fault than those of the Fairchild in bringing about the collision. We think it also apparent that they were more at fault than the controllers.

[4] In discharging their duty to the F-27, the controllers warned it of the Cessna's presence, giving it all the information that they had: course, speed and location. Its altitude was unknown, and they could do no more; but it was unlikely in the extreme that, as sadly proved the case, the Cessna was at or moving to the exact same twenty or thirty feet of altitude — out of all the fifteen thousand feet or so in which it might have been found — where the F-27 was passing. The odds of such a thing were on the order of three or four hundred to one; too short for nonchalance, but far too long for panic.

[5] The trial court found fault with the controllers' failure, in the one minute or so interval between their first warning and the

---

[4] The court had earlier noted that this device, which enhances an aircraft's radar signature, was weak on the Cessna and known to be so.

collision, to again warn the F-27 that the Cessna was in the immediate area and that their courses were converging. We are doubtful that this was negligent at all. The F-27 knew its own course and was warned of the general course and location of the Cessna; four miles, and just to the right of, directly ahead, on a course of southeast. The court speculates in its opinion that the Cessna may have turned or have already been turning toward the F-27 at the time of the warning, but it seems clear, as the court notes elsewhere, that the convergence of the two aircraft was a continuing one. And although the court also criticizes the controllers for not attempting to warn the Cessna as well as the F-27, it had already noted that the Cessna may not have been monitoring the channel used by IFR traffic in the vicinity of the VOR, nor was there much time in which to rabbit possible channels, warning the inattentive of the Fairchild's presence.

[6] In sum, it seems all too apparent that it was the rash conduct of the Cessna pilots in choosing to maneuver in a traffic area at a dangerous altitude without landing light, probably half-blind and perhaps deaf as well, that was the root cause of the accident. Their duty to avoid it was the primary one, that of the controllers secondary; and theirs was clearly the greater fault. In such circumstances, there can be no recovery against the United States.[5]

The judgment of the trial court is therefore REVERSED, and the cause is REMANDED with instructions to enter judgment for the United States.

---

[5] The Texas form of comparative negligence permits no recovery against one who is less negligent than the plaintiff. See Article 2212a Tex. Rev. Civ. Stat. § 1.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-2002

OLEN WARD MURFF, Administrator of the Estate of DAN ALLEN MURFF, DECEASED, *Et Al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(March 31, 1986)

Before GEE, RUBIN, and DAVIS, Circuit Judges.

GEE, Circuit Judge:

Even judges should not take themselves too seriously. Discovery that one has simply misread a trial court finding is of great assistance in recalling this ancient truth to mind. Sua sponte, we withdraw our earlier opinion, substituting the following:

At a bench trial in this Federal Torts Claims Act[1] case, the district court apportioned fault in a mid-air collision — one that took place under visual conditions — seventy percent to the air traffic controllers and fifteen percent each to two pilots. The United States appeals the consequent judgment against it for

[1] 28 U.S.C. § 2671

damages, contending, among other claims, that this apportionment was clearly erroneous. Concluding that it was, and further concluding that, on the predicate facts found by the trial court, no determination that the controllers were so much as equally at fault with plaintiff's decedents can be supported, we reverse the judgment appealed from and remand for entry of judgment for the United States.

FACTS

In August 1980 a light airliner on a flight from South Dakota to Dallas collided with a small training plane near Fort Worth. The airliner, a Fairchild F-27 flying under Instrument Flight Rules (IFR), landed successfully. The other, a Cessna 172 flying under visual rules (VFR), fell to earth, carrying instructor and student to their deaths. Both were experienced pilots, the instructor, John Fitzgerald, considerably more so than his pupil, Dan Murff, however.

The Cessna became airborne at about 11:00 a.m. on the morning of the crash and embarked on a catalogue of actions and omissions that substantially increased the likelihood of its occurrence. As the trial court found:

> Murff and Fitzgerald neglected to file a flight plan and did not request flight following or radar service from air traffic control once airborne. Apparently, they did not take the precaution of burning the Cessna's landing light as encouraged by the FAA's "Lights On Program." Supposedly, because of the temperature, Fitzgerald decided to fly above the 5000 foot ceiling recommended by his employer, Acme School of Aviation. Fitzgerald also apparently directed Murff to maneuver near the Bridgeport VOR Station, a frequent intersection point for instrument flight rules (IFR) traffic. Finally, while it is uncertain whether the pilots failed to monitor the radio channel used by IFR traffic in the vicinity, they at least failed to notify the controllers of their location and intentions.

In addition, the court found, because the Cessna was on an instrument training mission, "presumably, student Murff was wearing a 'hood' which restricted his vision to the instruments." And so, shortly after eleven o'clock, we find the Cessna, burning no landing light and with one of its two lookouts blinded, maneuvering at a dangerous altitude in an intersection of aerial traffic without having notified the controllers of what it was about.

The F-27 airliner, by contrast, was flying IFR and under the direction of the controllers, who knew its precise altitude, speed, and direction at all material times. Entering the area of the Bridgeport VOR, the F-27 reported in at 11:20:55 a.m. at an altitude of 19,000 feet and, at 11:25:12, was cleared for descent to 10,000. Six minutes later, it was cleared to 6,000 feet and a position ten miles east of the VOR. At 11:35:48 the controllers warned it of the Cessna's presence:

> Fairchild seven whiskey alpha VFR traffic at one o'clock ah four miles southeast bound slow moving altitude unknown.

Thus, although the Cessna could have been at any altitude and the chances of its being on the same exact level as the F-27 were small, the aircraft were approaching each other on near reciprocal courses.

At 11:36:00 the F-27 responded to the traffic advisor:

> Ah Whiskey Alpha looking ah no joy[2] we're above a cloud deck here.

Sometime within the next one minute and fourteen seconds, the collision occurred, for at 11:37:14 the F-27 reported it to the controller:

> Ah center Fairchild Seven Zero Seven Whiskey Alpha we've just had a mid-air [collision].

---

[2] "No joy" is airman's slang for no sighting or no contact.

As was noted at the outset, the transport was able to land safely following the collision, but the trainer was lost.

THE DUTIES INVOLVED

Although the trial judge made no specific finding that the collision occurred in an area of clear air, free of clouds, other expressions in his opinion make plain — as does the record evidence — that this was the case.[3] In such circumstances, the primary responsibility for avoiding collisions rests with the pilots, not the controller. Numerous authorities so recognize; indeed, the proposition seems generally settled. *In re N-500L cases*, 691 F.2d 15, 28 (1st Cir. 1982), for example, the court observed that, according to regulations having the force of law:

> Although air traffic controllers may have responsibilities concurrent with those of the pilot in the terminal area, . . . the primary responsibility for avoiding collision and wake turbulence in VFR conditions is with the pilot (citation omitted).

Accord, United States v. *Schultetus*, 277 F.2d 322, 327 (5th Cir.) *cert. denied*, 364 U.S. 828 (1960). It is thus apparent that the primary responsibility for avoiding the fatal collision lay on the Cessna and F-27 pilots, not upon the controllers.

DEGREES OF FAULT

The trial court found the controllers largely at fault (70%) and the pilots of the trainer mildly and equally so (15% each) in causing the collision. After discussing what it viewed as the controllers' fault, the court proceeded to that of the Cessna pilots:

---

[3] Statements of the F-27 crew were that they never entered the clouds, but rather were proceeding from clear air at altitude down through a space between the clouds; and the plaintiff's expert witness had "no doubt" that the collision took place in visual conditions.

The court's opinion appears to assume that this was the case observing, for example, "both planes were painted white and likely both had clouds behind."

> The victims themselves, however, were not without fault. As noted above, both were experienced pilots, presumably familiar with safety procedures. Both men failed to exercise reasonable care by advising controllers of their location and intentions, by not requesting flight following or radar service, and by not burning the landing light, Fitzgerald, as the instructor, had an additional responsibility to Murff who, necessarily, was relying on Fitzgerald to keep a lookout while Murff wore the hood. Moreover, Fitzgerald was further negligent in choosing to fly at the collision altitude while near the Bridgeport radial. He further erred in continuing the flight after he learned of the 172's weak transponder signal.[4]

In view of the above, we think it apparent that the Cessna pilots were more at fault than the controllers.

In discharging their duty to the F-27, the controllers warned it of the Cessna's presence, giving it all the information that they had: course, speed and location. Its altitude was unknown, and they could do no more; but it was unlikely in the extreme that, as sadly proved the case, the Cessna was at or moving to the exact same twenty or thirty feet of altitude — out of all the fifteen thousand feet or so in which it might have been found — where the F-27 was passing. The odds of such a thing were on the order of three or four hundred to one; too short for nonchalance, but far too long for panic.

The trial court found fault with the controllers' failure, in the one minute or so interval between their first warning and the collision, to again warn the F-27 that the Cessna was in the immediate area and that their courses were converging. We are doubtful that this was negligent at all. The F-27 knew its own course and was warned of the general course and location of the Cessna: four miles, and just to the right of, directly ahead, on a

---

[4] The court had earlier noted that this device, which enhances an aircraft's radar signature, was weak on the Cessna and known to be so.

course of southeast. The court speculates in its opinion that the Cessna may have turned or have already been turning toward the F-27 at the time of the warning, but it seems clear, as the court notes elsewhere, that the convergence of the two aircraft was a continuing one. And although the court also criticizes the controllers for not attempting to warn the Cessna as well as the F-27, it had already noted that the Cessna may not have been monitoring the channel used by IFR traffic in the vicinity of the VOR, nor was there much time in which to rabbit possible channels, warning the inattentive of the Fairchild's presence.

In sum, it seems all too apparent that it was the rash conduct of the Cessna pilots in choosing to maneuver in a traffic area at a dangerous altitude without landing light, probably half-blind and perhaps deaf as well, that was the root cause of the accident. Their duty to avoid it was the primary one, that of the controllers secondary; and theirs was clearly the greater fault. In such circumstances, there can be no recovery against the United States.[5]

The judgment of the trial court is therefore REVERSED, and the cause is REMANDED with instructions to enter judgment for the United States.

---

[5] The Texas form of comparative negligence permits no recovery against one who is less negligent than the plaintiff. See Article 2212a, Tex. Rev. Civ. Stat. § 1.